UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JENNIFER ECKHART and CATHY AREU

Plaintiffs

v. 20 Civ. 5593 (RA)
(Via Teams Videoconference)

FOX NEWS NETWORK LLC., ED HENRY, et al.,

Defendants

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New York, N.Y.
September 20, 2022
3:00 p.m.

Before:

HON. RONNIE ABRAMS

District Judge

APPEARANCES

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(The Court and all parties appearing via Teams videoconference)

THE COURT: Good afternoon. This is Judge Abrams. We're here for Eckhart v. Fox News and Ed Henry. We're here for oral argument and motion for reconsideration.

Who do I have on the line, please.

MR. WILLEMIN: Michael Willemin and Renan Varghese for the plaintiff. Good morning -- good afternoon, rather.

THE COURT: Good afternoon.

MS. FOTI: Good afternoon, your Honor, Catherine Foti for defendant Ed Henry.

MS. FISCHER: Rachel Fischer and Yonatan Grossman-Boder, your Honor, for Fox News Network.

THE COURT: Good afternoon.

Is there anyone else who would like to state their appearance today?

Why don't we get started. As I just noted, we're here for oral argument on Mr. Henry's motion for reconsideration of certain rulings of the Court's September 9, 2021 decision on his motion to dismiss.

Let me just start. I do want to just note that Mr. Henry rightly notes that the Court made an inadvertent error in summarizing its holdings on the final page of its opinion by stating that the third cause of action as it pertains to Eckhart's private photographs and messages against

Henry only survives. Plaintiff's third cause of action was, of course, a retaliation claim under Title VII against Fox News only because Eckhart did not allege this cause of action -- did not allege it with respect to Mr. Henry and because individuals are, of course, not liable under Title VII.

I just want to confirm defendant's understanding that Henry's third cause of action survives only as it pertains to Eckhart's termination against Fox News, as I believe is otherwise clear from the opinion. That was just a minor error, but I did want to confirm that, get it out of the way.

I also wanted to start -- this may be a little unorthodox, but I wanted to start by telling you what my thinking is on at least one issue, and I'll hear the parties out if they want to be heard, but I feel pretty confident about this.

So it's clear to me from the law that to establish a claim for retaliation under New York State or City Human Rights Law, that a plaintiff must allege some adverse employment action within the employment context. At the time of the filing of the photographs, neither Henry nor Eckhart were employed at Fox or otherwise had an employment action.

While it's true that this defendant focused its retaliation argument below primarily on whether Henry was Eckhart's supervisor, nonetheless, it did raise this issue, and I am inclined to find that it would be clear error to allow

those claims to go forward.

So if plaintiff's counsel wants to be heard on this, I'll hear you out, but I do think that that was, frankly, simply error.

MR. WILLEMIN: Understood, your Honor.

I'd just like to be heard briefly.

I think the dispositive case is the *Griffin v. Sirva* case because in that case, the Court of Appeals was addressing a question certified by the Second Circuit under the aiding and abetting section of the New York State Human Rights Law, and in that case, the Court addressed the issue of whether or not that aiding and abetting liability, which is textually exactly the same as retaliation liability in the sense it applies to any person, extends liability to a non-employer, and in that case the defendant in the case was a non-employer. Not like a coworker; it wasn't a coworker-employer issue. It was a third party that was not an employer. And the Court of Appeals held in the affirmative that under the aiding and abetting language, which is just the same as the retaliation language, that a non-employer -- in this case, that would be Ed Henry -- is any person for the purposes of the state and city human rights statutes. And to the extent there is any question about the fact that Ms. Eckhart was an employee at Fox at the time, post employment retaliation claims are regularly -- are regularly, especially in litigation context, upheld as being actionable.

So when you have --

THE COURT: Sorry. Can I just stop you there and just focus on *Griffin*? Didn't the plaintiff still need to plead the underlying employment relationship with the employer?

MR. WILLEMIN: At the time -- well, not to -- I don't believe -- and, I mean, I can look back at the case, but I don't believe that one had anything to do with the other; meaning, obviously there needed to be -- to the extent that you go after the one defendant, because the first two questions that were certified had to do, I think, with the first defendant, which was the employer, so to the extent that the plaintiff had to go after that employer, there's an employment relationship that was required for the underlying claims of discrimination.

But a retaliation claim uses different language, and an aiding and abetting claim uses different language. And plaintiffs -- you never have to establish an employment relationship at the time something happened, otherwise post employment retaliation wouldn't be a fit. So post retaliation is a fit. You can have an actionable retaliation claim for something that in this case, any person pursuant to the language of the statute and pursuant to the decision in *Griffin* does with respect to --

THE COURT: But there's still an employment relationship. I mean, look, I know, for example, that there

are certain cases where courts have found plaintiffs to have stated a retaliation claim where they are no longer an employee because -- sorry -- but the plaintiff still needed to allege an ongoing economic relationship between themselves and defendant. That happened in the *Schmitt* case, 178 A.D. 3d. 578. But here, what was the employment relationship between Henry and Eckhart at the time that the photos were filed?

MR. WILLEMIN: But I guess my -- for instance, if I could just address *Schmitt* for a minute? Respectfully, that's not what *Schmitt* said. It was an "or" there. I'll get the precise language. I'm pulling it up now. But the ongoing economic relationship language in *Schmitt* was an "or". What *Schmitt* held was: That there's jurisprudential grounding for expanding the boundaries of the employment context that is central to discrimination and retaliation claims in Section 8-107(7) -- the retaliation provisions -- to the extent necessary to provide redress when there exists some nexus between the retaliatory harm alleged and a relationship characterized in some manner as one of employment, past or present.

So to the extent there's a relationship between -- this is what *Schmitt* held -- the harm that is alleged -- in this case, obviously the harm from the filing of the photographs -- and the nexus of the past employment relationship, the courts have been very consistent that that

language, when you take *Schmitt* and you take *Griffin* together, that that would provide a basis for a claim against any person who engages in retaliatory harmful acts against someone where there's a nexus between that retaliatory harm and a past employment relationship.

THE COURT: So, look, I'll tell you, I will re-read *Schmitt*. I'll take a closer look at *Griffin*. This is how I'm inclined to rule, but I will take a close look before proceeding further.

And if Henry's counsel wants to be heard on this issue now, I'm happy to hear you out just so I have both your arguments sort of on the record, but what I thought would be more productive for purposes of this argument was to focus on liability under New York Civil Rights Law 52-B and with respect to the statute of limitations issue.

Why don't I turn back to Henry's counsel. If anyone would like to be heard on this issue, I'm happy to hear you out.

MS. FOTI: Thank you, your Honor.

Just really one sentence on that issue, which is that in *Griffin*, what Mr. Willemin neglects to point out is that was an editor because it was aiding and abetting of the employer retaliation. That's the crucial piece that's missing in terms of Henry and Eckhart and their relationship. There's no underlying employer retaliation. So that, I think, really ends

the discussion of *Griffin*, and I would also say in terms of *Schmitt* because in *Schmitt* there was ongoing employment relationship with the plaintiff. It might not be an employer in terms of (unintelligible), but there was an ongoing relationship where she was relying on the publication to pursue her employment interest because she was an art curator, and it was an art publication. So I would strongly agree with your Honor's inclination to say that retaliation claims not go forward on those grounds.

I'd like to turn now to --

THE COURT: Mr. Willemin, if you want to respond on that issue, maybe we can do it a little -- have the argument be a little unorthodox in the sense that we can go back and forth on each of the three issues.

MR. WILLEMIN: It will be 15 seconds.

So, your Honor, hopefully this will be helpful. The language in Schmitt that your Honor referenced said that the relationship didn't fit neatly into the categories of what would normally be an anti-discrimination claim.

But it says: That should not require dismissal of the claim against Artforum -- which is the third party -- as a former employer, or, alternatively, as a participant in an ongoing economic relationship.

So there's an "or" there, and in this case there was an employment relationship.

And with respect to the aiding and abetting, again --

THE COURT: Just to stop, I mean, Henry was never Eckhart's employer.

MR. WILLEMIN: Understood, but the retaliation provision under the New York City Human Rights Law and the New York State Human Rights Law specifically identifies any person.

THE COURT: No, I know that. I'm just saying you're quoting language, and this situation doesn't fall into either of the scenarios to the language you've quoted. I just want to make that clear.

MR. WILLEMIN: Understood. But in that case, that entity had liability as a former employer. But in this case their liability lies as against Henry because he's any person.

And the aiding and abetting language was not tied in the *Griffin* case to a requirement that the other corporate defendant had liability. So that's not what the *Griffin* case decided. The certified question was not answered by saying, oh, because there's another entity that has liability; it was answered on a textual reading of the New York City -- or in that case New York State Human Rights Law and the "any person" language.

THE COURT: As I said, I'll take a close look at those two cases, and I'll rule on that.

I'm happy to move on and hear from you, Ms. Foti, on the 52-B issue. I want to say something about that as we

start. I found that issue as to whether Mr. Henry violated 52-B very difficult. I found it difficult then. I find it difficult now. You're not going to convince me that it wasn't wrong to file the photographs. I just want to be clear about that. I think that that was wrong, and I think it was terrible judgment to do that because I could not consider them on a motion to dismiss.

That being said, that is a different question from whether Mr. Henry can be found liable for a violation of that statute. And two of the things that I have been kind of struggling with -- and I'd like you both to address -- is, number one, you know, can it be the case that you can be held responsible for violating the statute for filing something on a motion to dismiss that might be perfectly appropriate to file on a motion for summary judgment or at trial? Can that really be the case? And I think, Mr. Willemin, that is a question ultimately more for you.

But then I struggled a lot with the difference between Mr. Henry's actions and what was alleged specifically with respect to Mr. Henry versus the legal team. You know, I have Ms. Foti's affidavit, which, setting aside whether it's proper to consider it on a motion to dismiss, which, frankly, I don't think it is, but I am sort of left with the question of: Has plaintiff even alleged that Mr. Henry himself did this as opposed to his legal team? Do you want to address questions of

agency in that respect? I don't know, it may, frankly, even present a conflict of interest for counsel with respect to addressing this issue.

So those were some of the things that I've been struggling with on what I think is a very difficult question. But with that said, Ms. Foti, I'd be happy to hear from you.

MS. FOTI: Thank you, your Honor.

So, your Honor, I have to take issue with one thing you said, which is that you could not consider these pictures on the motion to dismiss, which I think is crucial to the decision-making here and crucial to deciding whether or not it was appropriate. Those pictures were in fact part and parcel of the WhatsApp communications that are contained in the complaint. The complaint cuts out a piece of WhatsApp communications that Ms. Eckhart has decided she wants to point to as establishing a pattern of harassment and establishing an alleged rape, and then doesn't choose to include any of the responsive communications. That is -- you know, that's her right

But I strongly would suggest to the Court that Mr. Henry has a right to set forth his factual narrative and why that is not accurate once those discussions are incorporated into the complaint. Those discussions come along with the pictures that were included. They weren't separate. They were part and parcel of the communications back and forth.

And I understand that I think we probably mis -- I don't think misled, but probably did not make it clear to the Court because we were attempting to understand what the date was of the alleged rape. We did not want to assert what we thought the date was of the alleged encounter the plaintiff was referring to in our motion to dismiss, so we did block out the dates on the pictures.

But if your Honor had asked, we would have, I think, been able to tell you in chambers as to the dates on those pictures, in fact, surround -- first, one predates by two days the date of the alleged rape, February 8. One is on the date of the alleged rape, February 10. And one is after by about ten days. And then there were a number of those that come after the alleged rape.

It is crucial, I think, to understanding that that is why these pictures are incorporated into the complaint by reference. They show the communications. Those pictures came with other communications from WhatsApp. What we have are those pictures remaining. We have, I think, from those pictures the ability to support Mr. Henry's counterfactual narrative that this was a completely consensual relationship.

THE COURT: Did you really think I was going to decide if it was a consensual relationship on a motion to dismiss? Could I really have decided that? Even if you're assuming that those pictures were incorporated into the complaint, how could

I have made that assessment? Doesn't that require credibility assessments, among other things?

MS. FOTI: Your Honor, but the question is whether or not we had an appropriate basis to include them in a motion to dismiss for purposes of presenting Mr. Henry's factual narrative, and what it does go to is whether or not he would be responsible for sex trafficking, okay, because the whole issue about the pattern and whether or not that was a consensual relationship, this was evidence of the fact that this was a different type of relationship; but all the relationships they alleged in the complaint, all the other relationships they allege in the complaint that set forth a pattern of sex trafficking were completely different than what this relationship was about. Those pictures demonstrate that the pattern does not exist.

So I think that is something that you could have decided. You chose not to, I understand that, but you could have decided that. So I do think though that there was a basis to incorporate them. And I am sorry that your Honor determined that the judgment was wrong, but in our judgment at the time, it was important as advocates for this client to advocate very zealously for what his side of the story was.

Unfortunately, we are faced with, obviously, an atmosphere in this country where when you present the narrative, as plaintiffs are allowed to present, of alleged

rape, that is to be believed by the Court. It's to be taken as true. That's completely understandable legally. It also is believed by the vast majority of the public. And what has happened in many cases, and in this case in particular, the plaintiff then goes on to publicize her version of the event broadly throughout the country by sitting in on radio shows, by presenting --

THE COURT: Just to be clear, I don't want to cut you off, but I have not put a gag order on either you or your client. He can get out there and say whatever he'd like to say. He could have denied this vigorously, which he has. There is a statute that prevents the publication of photos of this sort that has a limited exception that I want to talk about. And so I do understand his desire and your desire for him to defend himself, for you to zealously defend him, but there is this particular statute that prevents the publication of photos of this sort, and it has an exception that I want to talk about, but I want to let you finish your thought, if you'd like to, first, about exactly what the meaning of "common" is under the New York Civil Rights Law and any cases that interpret what that means in the context of legal proceedings. In any event, I didn't want to cut you off.

MS. FOTI: Your Honor, the only thing I wanted to conclude with is that it was a judgment in order to zealously represent our client. We appreciate your being willing to

allow us to present Professor Green's affidavit. I think if you look at that affidavit, we are under the ethical rules, and that was one reason we thought you could consider this under a motion for reconsideration, is that I don't know that the ethical rules were considered. Under the ethical rules, we were responsible to put forth our client's reasonable position, I think that we believed it was reasonable. I understand why the Court decided that it did not want to consider them, but we had a basis on which we believed the Court could consider them.

THE COURT: Do you think that plaintiff has plausibly alleged that Mr. Henry published these photos as opposed to counsel? Is there even a legal distinction between the two or is anything that counsel does in this respect attributable to the client? Can that argument be made here?

MS. FOTI: I don't think it can, your Honor, because it was counsel's decision to put these in the motion to dismiss. Whether or not it was based on Mr. Henry's presentment of the evidence, that's not sufficient to say that Mr. Henry has violated the Civil Rights Section 52-B. He has not published anything.

I understand that he is being represented by counsel, but counsel has made what we would say is a legitimate decision to publish these pictures in a way that they thought was completely consistent with the law. And there are no allegations whatsoever that Mr. Henry made any decision to do

this. In fact, I would say the history of this case demonstrates that he did not retaliate. He went out and he said that he did not do this; that it was a consensual relationship and nothing else.

At no time prior to what we believe was an appropriate time in the legal proceedings did Mr. Henry take any opportunity to publish these pictures or to even discuss the fact that these pictures existed. Counsel waited until what we understood was an appropriate time in the legal proceedings to be able to publish the pictures in a way that we understood to be appropriate.

The New York Civil Rights Law, Section 52-B, does make (unintellible) the filing of any picture that the person depicted, a still or video image, unclothed or showing an exposed intimate part. There is an exception, and I know that's what you're interested in, your Honor, and that is that you can in fact make these filings if there is a lawful and common practice of law enforcement, legal proceedings, or medical treatment.

So your Honor looked at the issue as to whether or not filing on the public docket was common. I have to take issue with that, your Honor, respectfully, because if in fact you're now looking at what is, in fact, common, it sort of reads out of the entire statute the fact that what we're talking about is the filing of nude pictures, right? The only way that the

statute makes any sense is that the filing of nude pictures is the essence of the statute, and what we're talking about is an exception. So for the Court to say that it is not common to file these pictures, even though it's redacted, would undercut the entire meaning of the statute. The statute would not -- you couldn't have an exception because it's not common in general to file nude pictures except in the course of trying to defend someone. And it is common to put forth evidence that is incorporated by reference in the complaint in a motion to dismiss. That is, in fact, a common practice.

We have not found any case law to discuss the definition of common in this context, but certainly I think the fact that the incorporated by reference provision is common, that that should undercut any allegation here that there was a violation of Section 52-B.

Now, specifically, I know you also -- and I want to address this, there's a reference in the opinion about the fact that whether or not something, you know, the naked pictures were, in fact, properly redacted. And your Honor refers to New York Penal Law 245 to talk about the fact that an intimate part means pubic area, but that law actually reads that an intimate part means naked genitals, pubic area, anus or female nipple. So that is defined by naked. We, in fact, took effort to make sure that the portions that were not allowed to be publicly filed were, in fact, redacted. So I don't think that there can

be a violation of the statute in any case because the parts that are defined as naked have, in fact, been redacted. So those have not been publicly filed.

THE COURT: All right. Thank you.

Mr. Willemin, do you want to respond on this?

MR. WILLEMIN: Sure.

So with respect to the propriety of filing the photographs, I don't believe -- and I won't re-litigate here the issue -- that these were somehow incorporated in the complaint. I think your Honor had that correct in the original decision. I don't know that it needs to be re-addressed, but the bigger problem -- or one of the bigger problems, among many -- is that these photographs were not even related to the legal arguments that were made by Henry in his motion. There was no basis upon which the Court, if it even were to review those photographs, could have come to some sort of different conclusion with respect to the motion to dismiss.

There was no argument made by Henry that because of these photographs, this claim should be dismissed or that claim should be dismissed. It was disconnected from the legal arguments in the case. And so that -- and I think Ms. Foti just sort of revealed the reason why these were attached is because they wanted to get them out to the public and respond publicly to Ms. Eckhart's allegations, which is not the appropriate forum to do on a motion to dismiss when the

documents are not appropriately attached or related to legal arguments. And so that in and of itself makes it uncommon. The idea that this reads the sort of litigation exception out of the statute is just simply incorrect. This is why I wanted to address your first question.

There are plenty of situations in which it might be considered common for these types of photos to be utilized in litigation. One would be under seal. One would be maybe completely redacted. Perhaps at trial, it would be appropriate for third parties to be -- these photographs to be put in front of third parties because a trial, obviously, has a different set of rules with respect to public access that you would have at this stage. Maybe during depositions they could be disclosed to a court reporter because that would be just sort of ordinary practice. I think there are a lot of criminal cases where nude photographs might be appropriately viewed, in a sense, as common. But it is not common. There is no case -- I've never seen anything like this in ten years for a defendant to take marginally redacted photographs of the plaintiff in really obvious personal circumstances, and, without notifying us, just put them on the docket and then refuse to have them temporarily sealed while the Court decides whether or not they should be sealed. The idea -- I think there was a reference in the papers to this where there's a disfavoring of filing sealed documents. But that's no excuse because we have a protective

order. I know that wasn't the issue when the motion was filed, but there's a protective order that's issued in every case of this nature that provides for pre-court approval or review of the filing of documents that would otherwise be considered sensitive or confidential.

So for Ms. Foti to argue that because there is a disfavoring of documents being sealed, she couldn't have sought consulting with us first or sought consulting with the Court before doing that. That does not make what she did -- and I'll get to the point about Henry in a minute. That does not make what happened here common. This is just not common. And there are plenty of circumstances, like I said, where you could call it common to have a photograph like this disclosed to a third party in litigation. It does not undo the exception. But this was a particularly egregious maneuver by defendant.

And in terms of the allegation with respect to Mr. Henry, I mean, we allege -- and this is something that I can, obviously if the Court wants further information on it, provide it. I wasn't necessarily expecting this particular question. But we say in paragraph 198 that it was clear that Mr. Henry was motivated by the desire to publicly harm and humiliate Ms. Eckhart by falsely claiming she sent him graphic pictures. So if you read the allegations in context, it's clear that we're alleging it's Mr. Henry's motive that was at play here, and --

THE COURT: Let me just stop you there.

It's still going to be plausible that he did it, right? He didn't publish these on Twitter. He didn't put them on Instagram. He didn't put them on Facebook, right? How could it be that Mr. Henry, as opposed to his lawyers, filed this? And is that distinction an appropriate legal distinction to be made between an individual and counsel?

MR. WILLEMIN: Well, your Honor's footnote 16 in the original decision of the motion to dismiss, I think, holds correctly that that is not an appropriate distinction to be made. But even if it were, then there would be a conflict because, I mean, respectfully, then Ms. Foti would be the defendant in this case, and, you know, Mr. Henry can argue, I suppose, that he had nothing to do with this. But it's really an issue for discovery. I mean, Ms. Foti, just by submitting that affidavit, has made it clearly an issue for discovery.

Mr. Henry's knowledge and his consent and direction with respect to publishing these is an issue that could be further explored. But as a practical matter, it's his papers. So maybe he didn't click the ECF button, but no plaintiff clicks the ECF button, but it's his papers. It might have been drafted by Ms. Foti, but it is him as a party that's taking the position, and it's him as a party that's filed those papers. They're filed on his behalf by Ms. Foti. I think that's what ECF actually even says when you look at the ECF--

THE COURT: Let me stop you there.

Do you know any of case in which an individual has been found liable under this provision for something that their lawyer filed in a legal proceeding?

MR. WILLEMIN: I'm not aware of in either direction a case that addresses that particular issue; but at the end of the day, Ms. Foti is an agent of Mr. Henry with respect to this action, and basic principles of agency bring her conduct back to Mr. Henry.

THE COURT: Most of those cases with respect to agency deal with situations where a client was responsible for what a lawyer did or didn't do in a particular action, but not a filing of a whole cause of action, liability on a whole cause of action because of conduct of a lawyer. So if there are cases on that, I would be interested in seeing them where you can find those scenarios even outside of the Rule 52-B context.

MR. WILLEMIN: I mean, I think in analogous circumstances, I mean, every case that involve retaliatory litigation of the human rights law, every case involves a document that was ultimately filed by counsel and filed with the advice and direction of counsel, but that document is still a defendant's document, right?

So, for instance, if we are right on Mr. Henry being potentially liable under the New York State and City Human Rights Laws, he would be liable for the fact that this document

was filed in retaliation for Ms. Eckhart's decision to raise claims. That issue did not even come up at any point during any briefing, and it's just -- so any time a retaliatory piece of litigation is filed, it's never the attorney that is the one who's sued for that. It's always the client. And it's liable under the statute. It's no different being liable under the City Human Rights Law than it is being liable under a different statute violation.

So I don't see that there's a -- let's put it this way: Either Mr. Henry or Ms. Foti is appropriately a defendant in the case. I think, based on everything I've just said, that it's Mr. Henry's paper, and so I think based on principles of agency, I think even if you put aside agency -- I know that Ms. Foti filed it, but it's his papers -- and just like he would be liable, not for her conduct, but for the fact that his papers did something that violated the law, just like his papers would have violated the anti-retaliation statutes, if he's still covered by those statutes. So I don't know if there was anything else sort of specific I wanted to say. I am not sure. I hopefully have addressed your questions.

THE COURT: I have two more questions.

So, one, are you aware of any case law that defines the word "common" under this provision under 52-B of the New York Civil Rights Law? And how I can interpret it in a context like this one?

MR. WILLEMIN: I don't. I think maybe we could obviously brief this -- we could brief this ten more times. We could brief issues of statutory construction, but, generally speaking, the rule is that the word has its common usage, or its ordinary usage. I don't think it's right to say common common. So it would have to be something that happens with some degree of frequency. I don't know whether it's something that happened ten times, a hundred times or 200 times, but I can just say that no one -- between me, between your Honor, I think between Ms. Foti and everyone in this Zoom -- has ever even heard it happened once, anything like this. So I don't see under any definition how you could possibly categorize something as common.

One other point I wanted to make, actually, because I wanted to make this with respect to the retaliation claim. But the ethics opinion is really neither here nor there. Whether Ms. Foti violated the rules of professional conduct has nothing to do with whether or not this statute was violated or if the anti-retaliation statutes were violated. The anti-retaliation statutes, the issue is the motive of Mr. Henry, not whether or not -- there may be some overlap between retaliatory conduct and violation of rules of professional conduct, but the two are not the same. It's a different set of rules.

And the same can be said for 52-B. So I did want to make that point as well. And even if it were somehow an out to

say that, well, I can't be held liable for retaliation or for 52-B because my attorney didn't violate the rules of professional conduct -- which, again, doesn't make any sense -- but even if that were an out for a defendant, that would be something that would to be decided after discovery, not on a pre-discovery basically expert report that I think we appropriately didn't respond to at this stage because expert discovery is for somewhere down the line.

THE COURT: Let me ask you a question. Do you think that these photos could be filed in connection with a motion for summary judgment?

MR. WILLEMIN: I think they should be filed under seal. I mean, yeah, at some --

THE COURT: Would it be a violation of 52-B to file these in connection with a motion for summary judgment?

MR. WILLEMIN: If what happened today, now, happened on the motion for summary judgment, meaning we weren't consulted, the issue wasn't brought before the Court, there was no opportunity given for the Court to decide, then I think it would be just as uncommon on a motion for summary judgment as a motion to dismiss, and it would be a violation of 52-B.

But I could see a situation in which the Court on a motion for summary judgment might say that it is at this point appropriate or more common, so to speak -- I would argue otherwise -- such that the behavior wouldn't ultimately, once

the Court has a chance to review it, violate 52-B. And I can certainly understand at trial that there is going to need to be -- I get that, right? I mean, that would be what I would say, I would most concede that if we try this case in front of a jury, the jury is going to have to see these pictures, but that doesn't make this common. It just doesn't.

THE COURT: Can you respond to counsel's argument with respect to this being incorporated by reference into the complaint because it was part of the back-and-forth. I mean, look, it is true that I have looked at even in this case other texts that weren't in the complaint, right, and I think properly so. I think that was actually with respect to one of the defendant's that Ms. Areu sued, but why is this not incorporated into the complaint as part of those texts back and forth?

MR. WILLEMIN: Well, for one, I don't think that there's any actual clarity on when all these texts were sent because I think many of them were screenshotted after the fact, so I don't want to make a firm representation, but I don't believe that my client is going to testify that any of them were sent after the rape. But, I mean, the prevailing case law -- I think we addressed this in the context of the Areu case, although I wasn't her attorney at the time -- is not that every single communication even within the same, I don't even know if I want to call it chain, right? Because something

happens one day, something happens a few days later, something happens a few days later. And so I think that it's fair in this case to say that what we included in the complaint were specific incidences of his inappropriate and lewd such comments, written comments, and that this is far enough afield, certainly not something that we were relying on in any way. Because usually they apologize -- but usually when you incorporate something into a complaint is because a plaintiff is inherently relying on it, right? So you've referenced a contract that you're relying on, but you didn't attach it to the complaint. I'm not saying that that is always the case, but that's where this normally comes up. Here, we obviously weren't relying on it in any way.

But I think the bigger point, I think a much more important point is where I started, which is it didn't have relevance to the legal arguments, and it could have been filed under seal. Just because something is incorporated into a complaint doesn't mean that you can just file it on a public docket however you'd like to the extent that there is basis for such materials to be filed under seal. Those are the bigger issues. And you'll note, we didn't really take issue -- even though I think it was inappropriate -- with the fact that Henry re-filed many of the communications at issue on the public docket with respect to a second motion to dismiss, even after the Court said that that extrinsic evidence in its sealing

decision was not for consideration.

So I'm not trying to take a scatter-shot approach. I am not trying to be unreasonable, but this was completely uncommon and unusual. Even if it was incorporated into the complaint, the way in which they went about this, it never had to be filed on the public docket, ever. And the Court in determining that it should be sealed at the time being has held that it shouldn't have been filed on the public docket. So if it shouldn't have been filed on the public docket, and we can't think of any other case in which anything like this has ever happened, it's not common. And so that's how I'd respond to that.

THE COURT: What's the intent requirement for the statute?

MR. WILLEMIN: It's annoy, harass. I don't want to misstate it, but I believe it's to harass or annoy. And I think that the Court's decision -- in deciding this case, the Court held that that was what we had alleged the intent to be in doing this, and that Henry had alleged, obviously, a less nefarious motive than that, but you can't undo a pleading, right? So at the end of the day, our allegations in the original decision, I think you addressed this specifically, were sufficient to meet the standard, which I believe is to harass or annoy. And so that's what I believe the answer is.

THE COURT: Thank you.

Ms. Foti, do you want to respond to any of those points?

MS. FOTI: Yes, your Honor, a number of them. So 52-B specifically requires that the filing be for the purpose of harassing, annoying or alarming such person, disseminate or publish or threaten to disseminate or publish such a still or video image, and then there's the exception. So a cause of action only arises when the purpose is harassing, annoying or alarming such person. Here, the purpose is to present Mr. Henry's side of the story or even for Mr. Henry to present his defense. It doesn't fall within any of those three parameters. There's no allegation in the complaint that suggests Mr. Henry intended to do any of those things.

Let me go back to the common language because I note it's something you're focusing on, and, unfortunately, there doesn't seem to be any case law on it, and I have to suggest there's no case law on it because what they're talking about is they're talking about lawfully common practice of law enforcement in legal proceedings, is that where there's a common practice is a motion to dismiss, is the complaint, is the opposition to these motions, and summary judgment motions, and it's a fact presentation at trial. Those are the common elements of a legal proceeding. And a motion to dismiss was a common element of a legal proceeding.

I understand that Mr. Willemin said many times that

he's never seen this, he's never seen this. Your Honor, we have never seen someone cut and paste their text messages and place them into a complaint completely devoid of context. We've never seen that, right? So that would not turgidly, I guess, be that common. But what is common is in fact when someone does something like that and cuts and pastes from the exact communication that accompanied these pictures, then they're incorporated by reference. And that is what has happened here.

Significantly, one of the things that I think is somewhat odd -- and I question as to how the statute applies at all -- is that Ms. Eckhart is saying that many of these pictures are not even of her; that they are pictures she took off the internet. If they're pictures she took off the internet, then I don't know that the statute applies whatsoever. And if the pictures that are of her are the ones that are less salacious, then they are not naked pictures, and so they cannot be the basis for a violation of this statute.

THE COURT: All right. Thank you.

Why don't we turn to the last issue, which is the statute of limitations issue. Who would like to be heard first on that. I mean, it's your motion, Ms. Foti, so I'll turn to you.

MS. FOTI: Yes, your Honor.

On the statute of limitations, I do think there was an

error in the interpretation of the case law. And what has happened in terms of the cases is that to find that there was a violation, the additional acts after the statute of limitations, they themselves have to have amount to an act of harassment. It can't simply be that those acts trigger something in someone's mind to recall the previous harassment. Those acts themselves need to be acts of harassment.

That is not what happened here. We've got three text messages basically saying hello. "Hello. Yo." The second one I think is "Why did you take away," and then there was the Heisman trophy, which suggests that someone -- it was an attempt to communicate. But that in and of itself is not sufficient to make out an allegation of harassment.

THE COURT: Can you just respond to the line in my opinion that says: "A picture of a football player doing a defensive measure certainly takes on a different meaning when it is sent by an alleged rapist to his purported victim immediately after she 'physically ran away from him.'"

Can you respond to that, please?

MS. FOTI: Sure, your Honor.

So the allegation itself about the Heisman trophy picture, there's nothing in that that suggests harassment. It suggests an attempt to communicate, I agree. But if your Honor were correct, then every attempt to communicate with someone who allegedly was the subject of your harassment would then

continue the statute of limitations.

The fact is that might bring back what happened to her, but that is not sufficient under the case law. But specifically under *Drew v. Plaza*: In determining a violation exists only if "all acts are part of the same unlawful employment practice and at least one act falls within the time period."

Again, the point that is making is that one of the acts has to fall within the time period. One of the acts. Not any act. It has to be one of the acts of harassment. And so that I do respectfully suggest that your Honor was not correct in the finding that there was a violation that the act continued past the statute.

THE COURT: Thank you.

Mr. Willemin, can you respond to that and particularly the argument that Ms. Foti just made that if this is the case, it extends the statute of limitations in a situation in which any offender has contact with the person, you know, on an ongoing basis.

MR. WILLEMIN: Yes. So, as your Honor, I think, pointed out in the opinion, that's just not the case.

The reason that this is part of a continuing violation is because of the similarity it shares with the conduct that happened back in 2014, 2015, 2017 where there were multiple unsolicited messages to our client and multiple occasions in

which Mr. Henry said, "You're playing hard to get" or in some way tried to then back that up with making her feel bad so that she would come to be with him, and that led to what it led to.

If he had just come and said hello, and she walked away, and he didn't then re-engage in a way similar to what he did in 2015, 2016, 2017 when he was sexually assaulting her, that would not be in and of itself a communication that would restart the statute of limitations. It might be uncomfortable, but the reason that this is part and parcel to the overall pattern and practice is because of the similarities it shares with the prior event. If he had sent her an email saying, "Do you want to come to my show tomorrow?" And she ignored it, and he ignored it, and they went on their separate ways, that would not re-trigger statute of limitations.

But like the case that was just cited *Drew v. Plaza*, even what Ms. Foti just said, one of the acts of harassment has to be within the statute of limitations period. This is an act of harassment.

What Ms. Foti didn't say, because the case doesn't say, is that you have to have an independently actionable hostile work environment within the limitations period. And so this is an act of harassment that is part of an ongoing hostile work environment. It's ripe within the definition that *Drew* would consider appropriate, and it also fits right in the definition of what your Honor decided consistent with Second

Circuit case law *McCollum*, *Kater*, *Ramsey*, and your Honor, I think even a week after the decision in this case, issued a decision in *Dikombi v. The City University of New York* case in which your Honor held the same thing, relying on the Second Circuit as well.

So the idea that Mr. Henry could never have a communication or what have you without extending the statute of limitations is just a red herring because it has to do with the similarity with which the conduct shared with the earlier conduct. And that's the whole point of the Continuing Violations doctrine. A hostile work environment obviously does not occur in a single moment in time. It occurs over a period of time, from the first act of harassment to the last. Neither the first act of harassment, nor the last act of harassment, nor any act of harassment in between the period of the hostile work environment has to be independently actionable in order for that act of harassment to count towards the hostile work environment.

This hostile work environment began in 2015 or 2014, and it ended in the end of 2018. And just because the first, the bookend conduct is not independently actionable, has no bearing on whether the length of time that this hostile work environment happened.

They also cite the *Williams* case, but the *Williams* case -- first of all, the *Williams* case is non-actionable

conduct that occurred during the limitations period, was not even directed at the plaintiff. And in the *Williams* case decided that in the plaintiff's own view, it was nothing more than a trivial inconvenience. I don't think *Williams* can fairly be read because it did not analyze the specific issue of whether or not it had to have been independently actionable. It just simply noted in that case that it wasn't.

I would argue -- and maybe I don't need to for all the reasons I just said -- that it is independently actionable, frankly, when she runs away from him and he puts up a stop sign, knowing that that is subjectively and objectively hostile given the history of the parties to which your Honor alluded, which is that the last time he did something like that, he raped her. And so even though on its own act devoid of context, putting a Heisman sign might not be objectively hostile in the context of this case, even if it were required to be independently actionable, I would argue it is. That is also what the *Williams* case says in a footnote, it says: One can easily imagine a single comment that objectifies women be made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable. And that's in context what Henry's comment, his stop sign and hard to get, and the things he did in 2018 are consistent with his view of the role of Ms. Eckhart, at least, in the workplace, insofar as his sexual gratification.

So I think under any analysis, the Continuing Violations Doctrine would apply.

THE COURT: All right. Thank you.

Ms. Foti if you want to respond briefly. If for reason the call ends, we'll get back on. I just got a five minute notice, but I'm happy to hear you out, Ms. Foti.

MS. FOTI: I will be brief, your Honor.

The fact of the matter is I disagree with Mr. Willemin. It does have to be independently actionable. That is what *Williams* said. What *Williams* determined was that the comment that was after the limitations period was a petty, slight, or trivial inconvenience. That is what, I would say, these comments, this yo, the Heisman trophy is not independently actionable. It is completely different than the conduct that they're alleging led to the alleged rape, which was, you know, "Come out to dinner with me." They're alleging that she was required to come to a conference room for the sexual act where she was performing oral sex on him; that she had to go to dinner with him. She didn't feel like she could avoid it. And there was long discussions, you know, sort of at dinner, and she was required to go to the hotel room. The fact that he went by and said hello is of a completely different nature.

Finally, the hard-to-get comment, I understand your Honor has identified that as being something of a similar

nature. I just don't agree that that is the case because the hard-to-get comment, if you look at the context of both parties' interactions, is a comment that first was used by Ms. Eckhart calling herself hard to get. So that was in the context of their relationship the fact they're saying hard to get may have something to do with the underlying relationship but has nothing to do with the fact that just saying "hello" and "yo, why did you go take away from me" is the same as hard to get. That is taken completely out of context, your Honor. So I think it is significant for you that the *Williams* case is a case that is helpful here.

THE COURT: Thank you all for your advocacy today.

Sorry, Mr. Willemin, did you want to say one more thing?

MR. WILLEMIN: Just on the last point. It says we plead twice that Mr. Henry accused Ms. Eckhart of playing hard to get in paragraph 62 and in paragraph 42, and so that's the pleading.

THE COURT: All right. Thank you all.

Look, these are difficult questions, and I appreciate your advocacy today.

What I'd like you to do is if you could order the transcript of today's proceeding as quickly as possible, and I will try and rule promptly. So thank you and enjoy the day.

(Adjourned)